Hasbullah Chan & Associates Architect v Rahika Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5-22-240 OF 1997
ABDUL MALIK ISHAK J
13 JULY 2000

Civil Procedure *— Judgments and orders — Judgment in default of defence — Setting aside of — Plaintiff's application for summons for directions, whether amount to waiver of right to apply for judgment in default of defence —Plaintiff failed to give notice of intention not to refer dispute to arbitration — Defendant deprived of opportunity to file application for stay — Judgment entered without alerting defendant — Sum claimed excessive and prematurely obtained — Whether unconscionable and improper conduct — Legal Profession (Practice and Etiquette) Rules 1978 r 56 — Rules of the High Court 1980 O 42 r 8(1)*

By way of a summons-in-chambers, the defendant sought for the following orders: (i) that the judgment in default of defence be set aside pursuant to O 19 r 9 of the Rules of the High Court 1980 ('the RHC') and under the inherent jurisdiction of the court; (ii) that all further proceedings in this action be stayed pending reference to arbitration; and (iii) that, by way of an alternative, the defendant be given leave to file the statement of defence. The senior assistant registrar dismissed the defendant's application. The defendant appealed. It was submitted, inter alia: (i) the judgment in default ought to be set aside under the inherent jurisdiction of the court and on the principles of natural justice since the plaintiff was guilty of unconscionable conduct in maintaining its silence until the service of the notice pursuant to s 218 of the Companies Act 1965 thereby depriving the defendant of the opportunity to file the application for stay and in not giving due notice of its intention not to refer the dispute to arbitration. The plaintiff had also obtained the judgment in default of defence without alerting the defendant nor the defendant's solicitors; (ii) the judgment in default of defence was irregular and should be set aside ex debito justitiae; and (iii) the judgment in default of defence was bad because the sum claimed was excessive and prematurely obtained.

Held, allowing the appeal:

(1) The facts of the case positively showed that the plaintiff was guilty of unconscionable and improper conduct. On the facts, the plaintiff had breached the rule of natural justice by not adhering to r 56 of the Legal Profession (Practice and Etiquette) Rules 1978. A plain reading of r 56 clearly shows that the parties to an action must conduct their affairs in a fair orderly manner adhering strictly to the rules of natural justice. Rule 56 has the force of law and its breach must be considered in the light of an application to set aside a judgment in default of defence (see pp 298D, H, 300C).

(2) The chronology of events clearly showed that the judgment in default of defence was wrongly and prematurely obtained. When the plaintiff filed the summons for directions, that would amount to a waiver of the plaintiff's right to apply for the judgment in default of defence. There was also a breach of O 42 r 8(1) of the RHC and a blatant disregard to r 56 of the Legal Profession (Practice and Etiquette) Rules 1978. All these when viewed in its correct perspective would render the judgment in default of defence to be irregular and it should therefore be set aside ex debito justitiae (see p 301E–F). A B

(3) Where the judgment was entered for a larger sum than was claimed, then that judgment will be deemed to be bad and as a matter of right be set aside forthwith. In the present case, since the sum claimed was excessive, the judgment in default of defence ought to be set aside ex debito justitiae (see p 310B). C

(4) On the facts, it was clear that the judgment in default of defence was obtained as a result of a procedural default, namely the failure to file the statement of defence. That failure was simply meant to preserve the defendant's right to refer the dispute to arbitration and had the defendant filed the statement of defence, the defendant would be prejudiced in that the matter cannot be referred to arbitration. The plaintiff's conduct was pure and simple unconscionable (see p 312H). D E

(5) In the context of the present appeal, the relevant witnesses ought to be produced so that they could testify as to the characteristics, architectural works and the development issues of the project that were governed by the agreements between the parties. In the interest of justice, the appeal should be allowed. The court applied the maxim audi alteram partem in favour of the defendant (see p 313C–D). F

[Bahasa Malaysia summary

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Melalui saman-dalam-kamar, defendan telah cuba mendapatkan perintah-perintah yang berikut: (i) bahawa penghakiman ingkar pembelaan hendaklah diketepikan selaras dengan A 19 k 9 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan di bawah bidang kuasa sedia ada mahkamah; (ii) bahawa semua prosiding selanjutnya dalam tindakan ini hendaklah ditangguhkan sementara menantikan rujukan kepada timbangtara; dan (iii) bahawa, secara alternatifnya, defendan hendaklah diberi kebenaran untuk memfailkan pernyataan pembelaan. Penolong kanan pendaftar telah menolak permohonan defendan. Defendan telah merayu. Telah dihujahkan, antara lainnya: (i) penghakiman ingkar tersebut haruslah diketepikan di bawah bidang kuasa sedia ada mahkamah tersebut dan atas prinsip keadilan semulajadi kerana plaintif bersalah atas tindakan tidak adil kekal berdiam sehingga penyampaian notis tersebut selaras dengan s 218 H I

A Akta Syarikat 1965 dan dengan itu melucuthak peluang defendan untuk memfailkan permohonan untuk penggantungan dan dalam tidak memberikan notis mengenai niatnya untuk tidak merujuk pertikaian itu kepada timbangtara. Plaintif telah juga memperolehi penghakiman ingkar pembelaan tanpa memberitahu defendan mahupun peguamcara defendan; (ii) penghakiman ingkar pembelaan B adalah tidak mengikut aturan dan haruslah diketepikan ex debito justitiae; dan (iii) penghakiman ingkar pembelaan adalah tidak baik kerana jumlah yang dituntut adalah keterlaluan dan diperolehi secara pra-masa.

C **Diputuskan**, membenarkan rayuan tersebut:

(1) Fakta-fakta kes tersebut secara positifnya menunjukkan bahawa plaintif bersalah atas tindakan tidak adil dan tidak berpatutan. Berdasarkan fakta-fakta, plaintif telah memungkiri kaedah keadilan semulajadi dengan tidak mematuhi k 56 Kaedah-Kaedah D Profesyen Undang-Undang (Amalan dan Etika) 1978. Membaca k 56 secara amnya jelas menunjukkan bahawa pihak-pihak kepada sesuatu tindakan haruslah mengendalikan hal ehwal mereka dengan cara yang adil dan menurut aturan mematuhi dengan tegasnya kaedah-kaedah keadilan semulajadi. Kaedah 56 mempunyai kuasa undang-undang dan kemungkirannya mestilah E dipertimbangkan memandangkan terdapatnya satu permohonan untuk mengetepikan penghakiman ingkar pembelaan (lihat ms 298D, H, 300C).

(2) Kronologi peristiwa jelas menunjukkan bahawa penghakiman ingkar pembelaan telah diperolehi secara salah dan pra-masa. F Ketika plaintif memfailkan saman untuk arahan, itu akan membawa kepada satu pengetepian hak plaintif bagi memohon untuk penghakiman ingkar pembelaan. Terdapat juga kemungkiran A 42 k 8(1) KMT dan tindakan secara terang tidak menghiraukan A 56 Kaedah-Kaedah Profesyen Undang-Undang (Amalan dan Etika) 1978. Semua perkara ini apabila G dipandang menurut perspekstif yang betul akan menjadikan penghakiman ingkar pembelaan itu sebagai tidak mengikut aturan dan ianya dengan itu harus diketepikan ex debito justitiae (lihat ms 301E–F).

(3) Di mana penghakiman telah dimasukkan bagi satu jumlah yang lebih besar daripada yang telah dituntut, maka penghakiman itu H akan dianggap tidak baik dan menurut hak dan hendaklah diketepikan dengan segera. Dalam kes semasa, oleh kerana jumlah yang dituntut adalah keterlaluan, penghakiman ingkar pembelaan haruslah diketepikan ex debito justitiae (lihat ms 310B).

I (4) Berdasarkan fakta-fakta, adalah jelas bahawa penghakiman ingkar pembelaan telah diperolehi kerana kegagalan prosedur, iaitu kegagalan untuk memfailkan pernyataan pembelaan. Kegagalan itu adalah hanya bermaksud untuk mengekalkan hak defendan untuk merujuk pertikaian itu kepada timbangtara dan sekiranya defendan telah memfailkan pernyataan pembelaan tersebut, defendan akan dimudaratkan iaitu perkara tersebut tidak boleh dirujuk kepada timbangtara. Tindakan plaintif sebenarnya dan semata-mata tidak adil (lihat ms 312H).

(5) Menurut konteks rayuan semasa, saksi-saksi yang relevan haruslah dikemukakan supaya mereka boleh memberi keterangan berhubung dengan ciri-ciri, kerja arkitek dan isu-isu pembangunan yang dikuasai oleh perjanjian-perjanjian antara pihak-pihak itu. Demi keadilan, rayuan tersebut haruslah dibenarkan. Mahkamah telah memakai maxim audi alteram partem yang memihak kepada defendan (lihat ms 313C–D).]

Notes

For cases on judgment in default generally, see 2 (1) *Mallal's Digest* (4the Ed, 1998 Reissue) paras 2763–2765.

Cases referred to

Alliance des Professeurs Catholiques de Montreal v Labour Relations Board of Quebec [1953] 2 SCR 140 (refd)
Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)
Asia Commercial Finance (M) Bhd v Bank Bumiputra (M) Bhd & Ors [1988] 1 MLJ 33 (refd)
C Paul D'Cruz v Chow Tai Yow & Sons Sdn Bhd [1999] 1 MLJ 51 (refd)
Chan Yuet Chan @ Chan Oi Lin b/s Wing Sun Trading Co v Martego Sdn Bhd [1996] 2 BLJ 431 (refd)
Davies & Davies v Nyland & O'Neill (1975) 10 SASR 76 (refd)
del Mel v de Silva (1949) 51 NLR 105 (refd)
Drew v Drew (1855) 2 Macq 1 (refd)
Errington v Minister of Health [1935] 1 KB 249 (refd)
Fernando v Ceylon University (1957) 59 NLR 265 (refd)
Field v Commissioner for Railways (1957) 99 CLR 285 (refd)
Furnell v Whangarei High Schools Board [1973] AC 660 (refd)
Green v Blake [1948] IR 242 (refd)
Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312 (refd)
Hopkins v Smethwick Local Board of Health (1890) 24 QBD 712 (refd)
Kewangan Bersatu Bhd v Yap Ah Yit & Ors [1999] 1 CLJ 429 (refd)
Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565 (refd)
Lim Su Sang v Teck Guan Construction & Development Co Ltd [1966] 2 MLJ 29 (refd)

Lion Engineering Sdn Bhd v Pauchuan Development Sdn Bhd [1997] 4 AMR 3315 (refd)
Lloyd v Mc Mahon [1987] AC 625 (refd)
Majukayu Sdn Bhd & Anor v Wong Pek Shong & Anor [1994] 2 CLJ 66 (refd)
Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374 (refd)
Nakkuda Ali v Jayaratne [1951] AC 66 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Oliver v Nautilus Steam Shipping Co Ltd [1903] 2 KB 639 (refd)
Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221 (refd)
PP Persero Sdn Bhd v Bimacom Property & Development Sdn Bhd [1999] 6 MLJ 1 (refd)
R v Russell (1869) 10 B & S 91 (refd)
Ridge v Baldwin [1963] 1 QB 539 (refd)
Smith v R (1878) 3 App Cas 614 (refd)
Spackman v Plumstead District Board of Works (1885) 10 App Cas 229 (refd)
Sumpter v Hedges [1898] 1 QB 673 (refd)
Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena) [1995] 3 MLJ 273 (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)
Walker v Wilsher (1889) 23 QBD 335 (refd)
Wan Mohd Sofian bin Wan Md Saad v MBf Finance Bhd [2000] 1 MLJ 319 (refd)

Legislation referred to

Arbitration Act 1952 s 6
Companies Act 1965 s 218
Rules of the High Court 1980 O 13 r 6(1), O 19 r 9, O 42 r 8(1), O 92 r 4
Legal Profession Act 1976 s 77
Legal Profession (Practice and Etiquette) Rules 1978 r 56

Mohd Aimi Zaini bin Mohd Azhar (*Zamani Ibrahim Tarmizan & Co*) for the plaintiff.

Avtar Singh (*Jaspal Singh & Mohd Shah*) for the defendant.

Abdul Malik Ishak J:

Introduction

By way of a summons in chambers in encl 12, the defendant sought for the following orders:

(i) that the judgment in default of defence dated 17 June 1998 be set aside pursuant to O 19 r 9 of the Rules of the High Court 1980 ('the RHC') and under the inherent jurisdiction of the court pursuant to O 92 r 4 of the RHC;

(ii) that all further proceedings in this action be stayed pending reference to arbitration pursuant to s 6 of the Arbitration Act 1952 and pursuant to O 92 r 4 of the RHC; A

(iii) that, by way of an alternative, the defendant be given leave to file the statement of defence within 14 days from the date of the order of this court; B

(iv) that the costs of this application be assessed and payable by the plaintiff to the defendant in whatever situation whatsoever, and

(v) any other order or relief which this court deems fit and suitable.

The senior assistant registrar ('SAR') heard encl 12 on 27 January 2000 and forthwith dismissed it. Aggrieved by the decision of the SAR, the defendant filed an appeal to the judge in chambers as seen in encl 28 on 28 January 2000. C

Chronology of events

From the affidavits as seen in encls 13, 14, 15, 18 and 19, the events that led to the appeal to the judge in chambers in encl 28 can readily be marshalled. For brevity, I will compendiously set out those salient events in chronological form: D

(1) On 14 June 1997, the plaintiff filed the writ of summons together with the statement of claim as reflected in encl 1.

(2) On 28 July 1997, the memorandum of appearance dated 23 July 1997 was filed in court by the solicitors for the defendant as seen in encl 3 and it was submitted that encl 3 was also served on the plaintiff's solicitors on 23 July 1997. E

(3) By letter dated 23 July 1997 (see exh 'R4' at p 65 of encl 13) and with a reminder dated 29 October 1997 (see exh 'R4' at p 66 of encl 13), the solicitors for the defendant notified the solicitors for the plaintiff to the effect that the dispute between the parties ought to be referred to arbitration, but unfortunately, the plaintiff did not reply to the defendant's solicitors' letters. F

(4) On 7 May 1998, the plaintiff filed the summons for directions as seen in encl 5 which was scheduled for hearing on 27 May 1998. The summons for directions was accompanied by a letter from the plaintiff's solicitors dated 23 April 1998 as reflected in encl 6 but unfortunately the summons for directions was not served on the defendant's solicitors or to the defendant itself despite the fact that the plaintiff was aware that there were solicitors on record for the defendant. G H

(5) On 27 May 1998, the summons for directions came up for hearing before the SAR. On that day, the endorsement on the court file showed that no solicitors were present and the SAR had to telephone the plaintiff's solicitors who confirmed that they were aware of the hearing date but did not attend as they wished to withdraw the summons for directions. Without further ado, the SAR struck off the summons for directions with liberty to file afresh. I

(6) By letter dated 30 May 1998 as seen in encl 7, the plaintiff's solicitors filed in court the draft judgment in default of defence for the court's approval. The plaintiff saw it fit not to send the draft judgment to the defendant's solicitors for their approval even though the plaintiff knew that there were solicitors on record for the defendant – – this was a blatant disregard of the RHC, in particular O 42 r 8 (1) thereof.

(7) On 17 June 1998, the sealed copy of the judgment in default of defence was filed by the plaintiff as seen in encl 8. It was worded as follows:

Dalam Mahkamah Tinggi Malaya di Kuala Lumpur
(Bahagian Sivil)

(Guaman Sivil No: S5–22-240-1997)

antara

Hasbullah Chan & Associates Architect ... Plaintiff

dan

Rahika Development
Sdn Bhd ... Defendant

Penghakiman

TIADA PEMBELAAN telah difailkan dan diserahkan oleh Defendan di dalam tindakan ini MAKA ADALAH DIHAKIMI SECARA INGKAR bahawa Defendan hendaklah membayar kepada Plaintif wang sejumlah RM1,149,958.38 (Ringgit Malaysia: Satu Juta Satu Ratus Empat Puluh Sembilan Ribu Sembilan Ratus Lima Puluh Lapan dan Sen Tiga Puluh Lapan) dengan faedah pada kadar 8% setahun dari 14 Jun 1997 sehingga penyelesaian sepenuhnya dan kos tindakan ini sejumlah RM225.

Bertarikh pada 17 Jun 1998

tt
HAJJAH WAN AZIZON BINTI AHMAD
Penolong Kanan Pendaftar
Mahkamah Tinggi
Kuala Lumpur

Penghakiman ini difailkan oleh Tetuan Ruslan & Zamani, Suite 6.01, Wisma Arab Malaysian, Jalan Tuanku Munawir, 70000 Seremban, peguamcara bagi Plaintif tersebut.
(RZ/474/97)
L/E

(8) Sometime in the month of December 1998, the defendant received from the plaintiff's solicitors a letter dated 24 November 1998 enclosing a notice pursuant to s 218 of the Companies Act 1965 (see para 12 of encl 13).

(9) By letter dated 15 December 1998 (see exh 'R5' at p 67 of encl 13, and para 13 of encl 13), the solicitors for the defendant wrote to the solicitors for the plaintiff disputing the s 218 notice that was issued under the Companies Act 1965. That letter too disputed the entering of the judgment in default and it also notified the plaintiff of the non

receipt of the sealed judgment by both the defendant and the defendant's solicitors.

(10) On 17 December 1998, the solicitors for the defendant wrote to the plaintiff's solicitors and requested for a copy of the sealed judgment.

(11) On 26 January 1999, the solicitors for the defendant received a copy of the sealed judgment from the plaintiff's solicitors.

(12) On 2 February 1999, the defendant filed the summons in chambers in encl 12.

(13) Finally, on 27 January 2000, the SAR dismissed encl 12 forthwith.

Several issues were raised and I shall now proceed to examine them in some detail.

The judgment in default of defence ought to be set aside under the inherent jurisdiction of the court and relying on the principles of natural justice

Certain salient facts must be emphasized and these facts would certainly activate not only the rule of natural justice but also the doctrine of procedural fairness. In the headnote to the case of *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565, particularly at p 567, the decision of Gopal Sri Ram JCA was paraphrased in these words:

> To deprive a defendant of the right of appearing upon the motion for judgment and arguing that discretion ought to be exercised in a plaintiff's favour constitutes a breach of a substantive right forming part and parcel of the doctrine of procedural fairness to which he is entitled.

It cannot be denied that the case of *Lai Yoke Ngan* was decided in the context of a judgment in default of appearance in breach of O 13 r 6(1) of the RHC and also in the context of the failure on the part of the plaintiff to deliver the statement of claim, yet the principles distilled therein were germane and applicable to the facts of the present appeal.

In regard to the rule of natural justice, it may be described conveniently in two potent words: fairness and impartiality. The rule requiring fair hearing or the audi alteram partem rule is very flexible and it applies to varying fact situation. Each case must be viewed separately and decided on its own merits. In *Lloyd v Mc Mahon* [1987] AC 625 at p 702, Lord Bridge of Harwich had this to say:

> My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision making body, the kind of decision it has to make and the statutory or other framework in which it operates … .

and these words although spoken in the context of administrative law must surely apply to the facts of the present appeal — after all, the concept of fair hearing is both elastic and malleable.

The expression 'natural justice' relates to procedural fairness and it has been described in numerous ways by brilliant judges before me. In *Smith v R* (1878) 3 App Cas 614 at p 623, the favourite phrase that was bandied about was 'substantial justice'. While in *Spackman v Plumstead District Board of Works* (1885) 10 App Cas 229 at p 240, the court resorted to the phrase 'the essence of justice'. In *Hopkins v Smethwick Local Board of Health* (1890) 24 QBD 712 at p 716, the phrase 'fundamental justice' was adopted by the court. Proceeding in the same direction, the court in *Drew v Drew* (1855) 2 Macq 1 at p 8 used a high sounding phrase like 'universal justice' 'to describe practically the same thing. Again, in *R v Russell* (1869) 10B & S 91 at p 117, the phrase 'rational justice' was employed. In *Errington v Minister of Health* [1935] 1 KB 249 at p 280, the 'principles of British justice' was employed to reflect procedural fairness. In *Green v Blake* [1948] IR 242 at p 248, it was simply described as 'justice without any epithet.' Harman J in *Ridge v Baldwin* [1963] 1 QB 539 at p 578 used the phrase 'fair play in action' to describe the same thing. A highly technical phrase was used in *Furnell v Whangarei High Schools Board* [1973] AC 660 at p 679 by Lord Morris of Borth-y-Gest when his Lordship described fairness as 'fairness writ large and juridically'. All these fancy phrases convey the same idea. No judge can declare that his idea is unique. Ideas from fellow judges are normally improved to suit the facts of each case. Now, the 'principles of Malaysian justice' must surely dictate the outcome of this appeal in encl 28. The audi alteram partem rule was vigorously applied in the Supreme Court of Canada in the case of *Alliance des Professeurs Catholiques de Montreal v Labour Relations Board of Quebec* [1953] 2 SCR 140 in order to decertify a trade union as the bargaining agent for employees. The Supreme Court of Ceylon although bound by the case of *Nakkuda Ali v Jayaratne* [1951] AC 66, applied the rule to a wide range of situations extending from the disqualification of a university student for gross misconduct (*Fernando v Ceylon University* (1957) 59 NLR 265) to the outright removal of local councillors (*del Mel v de Silva* (1949) 51 NLR 105).

With these general principles in mind, I will now proceed to highlight certain important facts:

(a) As alluded to earlier, the plaintiff failed to reply to the letters dated 23 July 1997 and 29 October 1997.

(b) The defendant waited in vain for the response from the plaintiff and it was because of this that the defendant did not file the application for the stay of proceedings pending referral to arbitration.

(c) As alluded to earlier the plaintiff did not serve nor notify the defendant's solicitors of the hearing of the summons for directions that was scheduled on 27 May 1998 despite being aware that the defendant had solicitors on record.

(d) Surprisingly, the plaintiff denied having filed the summons for directions and this denial can be seen at para 20 of encl 14 which was worded as follows:

> Saya menafikan perenggan 15 dan telah dimaklumkan oleh peguam plaintif bahawa tiada rekod bahawa saman minta arahan telah difailkan. Ini kerana

> defendan masih belum memfailkan pembelaan dan adalah tidak berasas untuk plaintif failkan saman minta arahan. Oleh yang demikian, dakwaan defendan bahawa plaintif melakukan tindakan yang mencurigakan adalah tidak berasas sama sekali.

and such denial was, to say the least, incomprehensible bearing in mind the existence of that summons for directions in encl 5.

(e) When the plaintiff entered the judgment in default of defence on 17 June 1998, it was done approximately 11 months after the defendant had filed the memorandum of appearance and this was done without giving any notice of intention to enter judgment to the defendant — a move contrary to r 56 of the Legal Profession (Practice and Etiquette) Rules 1978 which was made pursuant to s 77 of the Legal Profession Act 1976.

(f) Fairness dictates that the plaintiff should have given notice to the defendant of its intention not to refer the dispute to arbitration.

It was my judgment and I so hold that all the facts as alluded to above positively showed that the plaintiff was guilty of unconscionable and improper conduct. Two main reasons may be advanced to show that the plaintiff had abused the process of the court:

(1) in maintaining its silence until the service of the notice pursuant to s 218 of the Companies Act 1965 thereby depriving the defendant of the golden opportunity to file the application for stay;

(2) in not giving due notice of its intention not to refer the dispute to arbitration; and

(3) in obtaining the judgment in default of defence without alerting the defendant nor the defendant's solicitors.

Rule 56 of the Legal Profession (Practice And Etiquette) Rules 1978 graphically said:

> Where the name of the advocate and solicitor or his firm appears on the court record or the fact of representation is known to the other side, no advocate and solicitor representing the other party to the proceedings shall enter judgment by default against the client of the first-named advocate and solicitor or to take advantage of delay in pleading or filing documents in the nature of pleadings or in taking any necessary steps or in complying with any other proceedings by such first-named advocate and solicitor, unless he shall have given to such first-named advocate and solicitor written notice of his intention to do so, and [seven days] shall have elapsed after the delivery of such notice to the first-named advocate and solicitor.

and by necessary implication it imports the audi alteram partem rule and clearly therefore, on the facts, the plaintiff has breached the rule of natural justice by not adhering to r 56 thereof. A plain reading of r 56 clearly shows that the parties to an action must conduct their affairs in a fair orderly manner adhering strictly to the rules of natural justice. This brings to mind the decision of Edgar Joseph Jr FCJ (as he then was) in the case of *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374. At p 382 of the report, his Lordship in fine style said:

It is a familiar canon of statutory interpretation that unless a contrary intention appears, an enactment by implication imports the principle of the maxim audi alteram partem. It was said by Fortescue J in *R v University of Cambridge* (1723) 1 Stra 557, where Dr Bentley had been deprived of his academic degrees by decree, that the principles goes back to the garden of Eden. This is how his Lordship put it:

> 'The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called on to make his defence. 'Adam' (says God), 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat? And the same question was put to Eve also.'

In *Cooper v Wandsworth Board of Works* (1863) 14 CB NS 180, s 76 of the Metropolis Management Act 1855 required notice to be given to the district board of an intention to build a new house, failing which they could demolish the house. The board exercised this power in relation to the plaintiff's house without giving him an opportunity to be heard. It was held that an action for trespass lay against the board. Erle CJ said (at pp 187–189):

> 'The contention on the part of the plaintiff has been that, although the words of the statute, taken in their literal sense, without any qualification at all, would create a justification for the act which the district board has done, the powers granted by that statute are subject to a qualification which has been repeatedly recognized, that no man is to be deprived of his property without his having an opportunity of being heard. The evidence here shows that the plaintiff and the district board had not been quite on amicable terms ... the proceedings to demolish, merely because they had ill-will against the party, is a power that the legislature never intended to confer ... I can conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purpose of the statute, by the restriction which we put upon them, that they should hear the party before they inflict upon him such a heavy loss'.

Continuing at p 384 and spilling over to p 385, his Lordship aptly said:

> In my view, lapse of time is no bar to a defendant's application to set aside a judgment which is a nullity. (See *Atwood v Chichester* (1878) 3 QBD 722). I am further supported in this by the following passage in a very recent judgment of the Federal Court in *Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 at p 42:
>
> > '... it is clear law that the court still retains a discretion to set aside an irregular judgment despite long delay, provided it is satisfied that:
> >
> > (a) no one has suffered prejudice by reason of the defendant's delay;
> >
> > (b) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or
> >
> > (c) to let the judgment stand would constitute oppression (see *Atwood v Chichester* (1878) 3 QBD 722; *Harley v Samson* (1914) 30 TLRL 450).

> We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, the court has power to set aside a judgment in default, despite the defendant's application being out of time if the particular circumstances of the case require the intervention of the court (see *Beale v MacGregor* (1886) 2 TLR 311).'

Incidentally, his Lordship Edgar Joseph Jr FCJ (as he then was) delivered the decision in the case of *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 and at p 36 of the report his Lordship in graphic terms said:

> It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity.

Reverting back to r 56 of the Legal Profession (Practice And Etiquette) Rules 1978, I have this to say. It has the force of law and its breach must be considered in the light of an application to set aside a judgment in default of defence (compare the decision of *Asia Commercial Finance (M) Bhd v Bank Bumiputra (M) Bhd & Ors* [1988] 1 MLJ 33 with that of *Wan Mohd Sofian bin Wan Md Saad v MBf Finance Bhd* [2000] 1 MLJ 319).

I have no hesitation to set aside the judgment in default of defence for the aforesaid reasons and accordingly the appeal in encl 28 should be allowed with costs.

The judgment in default of defence was irregular and should be set aside ex debito justitiae

It was argued that the defendant was entitled to have these proceedings stayed before the plaintiff obtained the judgment in default of defence because the parties agreed that any dispute arising in respect of the rendering of professional services shall be referred to arbitration for resolution. It was also argued that had the statement of defence been filed, the defendant would be prejudiced as it would amount to a fresh step in the proceedings thereby depriving the defendant of its inherent right to have these proceedings stayed pursuant to s 6 of the Arbitration Act 1952.

There were three agreements between the parties. All these three agreements were dated 25 April 1996. The first agreement known as the 'Memorandum of Agreement between the Client and the Architect for Professional Services' was for planning services and it can be seen in encl 13 of exh 'R1' and in encl 14 of exh 'HA-1'. The second agreement captioned as the 'Memorandum of Agreement between the Client and the Architect for Professional Services' was for apartment blocks C & D and it can be seen in encl 13 of exh 'R2' and in encl 14 of exh 'HA-2'. The third agreement entitled the 'Memorandum of Agreement between the Client and the Architect for Professional Services' can readily be seen in encl 13 of exh 'R3' and also in encl 14 of exh 'HA-3' and it relates to 21 units of bungalows. In regard to arbitration, cl 21 of both the second and the third agreements were similarly worded and it carried the formula for reference to an arbitrator and it was worded in this fashion:

Disputes and arbitration 21	In the event of any dispute between the architect and the client, whether arising during or after the rendering of the services under the agreement, either party shall give notice in writing to the other party informing him of the matter in dispute and requiring its settlement. The parties shall then appoint an arbitrator but if they fail to do so within 14 days of the date of the notice, either party may submit a written request to the President of the Board of Architects to appoint a person to serve as an arbitrator, whose award shall be final and binding on both the architect and the client.

In *PP Persero Sdn Bhd v Bimacom Property & Development Sdn Bhd* [1999] 6 MLJ 1 at p 18 thereof, I had this to say:

> Similarly the court in Pembenaan *Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 held that where a party to an arbitration clause in a court action entered an appearance and filed a defence, that party was precluded from taking advantage of the remedy of arbitration,

and this was the fear of the defendant.

The chronology of events clearly showed that the judgment in default of defence was wrongly and prematurely obtained. When the plaintiff filed the summons for directions on 7 May 1998, that would amount to a waiver of the plaintiff's right to apply for the judgment in default of defence. There was also a breach of O 42 r 8(1) of the RHC and a blatant disregard to r 56 of the Legal Profession (Practice and Etiquette) Rules 1978. All these when viewed in its correct perspective would render the judgment in default of defence to be irregular and it should therefore be set aside ex debito justitiae.

Faiza Thamby Chik J in *Kewangan Bersatu Bhd v Yap Ah Yit & Ors* [1999] 1 CLJ 429 at p 438 explained the non-compliance with O 42 r 8(1) of the RHC in this way:

> Further, a judgment under O 19 r 2(1), as in the present case, has been obtained without hearing the merits of the case and the plaintiff's counsel, having notice, in particular, of defendants' counsel on record has a duty vide O 42 r 8(1) to forward a draft judgment for approval before proceeding in the preparation and filing the sealed judgment pursuant to O 42 r 10. Thus, the plaintiffs counsel's submission that O 42 r 8(1) is not applicable to them in this case is misconceived. There is a statutory obligation on the part of the solicitors for the plaintiff to file a draft judgment under O 42 r 8.
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> It is my view that the basic principle is that as long as a counsel has notice of the fact that there is an opposing counsel on record, there lies a duty under the ethical rule an obligation for either counsel to forward any draft order whatsoever for the opposing counsel's approval and to give due notice, which in this case the plaintiffs' counsel have failed to abide by.

Further down the same page of the same judgment, his Lordship continued to serious vein:

> Lastly the fifth issue is that the said judgment in default of defence had been entered as a result of the defendants' failure to comply with the procedural step ie, to file in a defence within the time provided. And the court has an absolute discretion to set aside such a judgment.
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> In *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40, the Supreme Court held that:
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> > 'Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the court has an absolute discretion to set aside the judgment on terms and allow the case to be heard on the merits.'
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> And moreover O 19 r 9 of the Rules of the High Court 1980 provides that:
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> > 'The court may, on such terms as it thinks just, set aside, … any judgment entered in pursuant to this order'.

That sums up the position of the appeal in encl 28. The appeal, in my judgment, should be allowed with costs.

Stay of all further proceedings pending reference to arbitration pursuant to s 6 of the Arbitration Act 1952

I have in great detail examined the general principles for referral to arbitration in *PP Persero Sdn Bhd v Bimacom Property & Development Sdn Bhd* and I must allude to some of the germane passages in that judgment. At p 11 of the report after reproducing in verbatim s 6 of the Arbitration Act 1952, this was what I said (see also p 12 of the report):

> and it gives the High Court the power to grant stay of all proceedings before it in any action initiated by a party to arbitration on an application by a party seeking to have the disputes or differences resolved through arbitration. That the High Court has an unfettered discretion under s 6 of the Arbitration Act 1952 is undeniable. The use of the word 'may' in s 6 of the Arbitration Act 1952 gives the impression that despite all the stated conditions being satisfied to the brim, the High Court has still that unfettered power to order a stay of all the proceedings. It is, after all, a matter of discretion to be exercised by the High Court. Edgar Joseph Jr SCJ in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 at p 112 in style said:
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> > 'It is well known that if a party can satisfy the court that the conditions for the grant of a stay under s 6 of the Act are satisfied, it does not ipso facto follow that he will be entitled, as of right, to a stay, for the court still retains a discretion to refuse it.'
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> Speaking on the effect of s 4 of the English Arbitration Act 1889 particularly in regard to the question of discretionary power, Lord Macmillan in his speech in the House of Lords in *Heyman & Anor v Darwins Ltd* [1942] All ER 337 at p 355 aptly said:
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> > 'The Arbitration Act 1889, s 4, makes the power of the court to stay an action under the arbitration clause a matter of discretion and not ex debito justitiae. Though the dispute is clearly within the arbitration

> > clause, the court 'may' still refuse to stay if, on the whole, that appears to be the better course. The court must, however, be satisfied on good grounds that it ought not to stay. The onus of thus satisfying the court is on the person opposing the stay, because in a sense he is seeking to get out of his contract to refer, though, in truth, an arbitration clause is not of strict obligation, because it is, under s 4, always subject to the discretion of the court.'
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> To me, it goes without saying, as the night follows the day, that the discretion reposed in the court whether to stay or not to stay the proceedings is a judicial one and that discretion must be exercised having regard to the particular circumstances of each case. No two cases are the same.

Continuing on the same page and spilling over to p 13 of the report, I had this to say on the onus of proof:

> Simply put, the onus of showing why the differences between the parties should not be referred to arbitration is on the party opposing the stay application (*Cheah Wai Poh v Chin Brothers & Co Ltd* [1958] MLJ 215; *Malaysia Government Officers' Co-operative Housing Society Ltd v United Asia Investment Ltd & Ors* [1972] 1 MLJ 113; *Heyman & Anor v Darwins Ltd*; The case of *The Eleftheria* [1969] 1 Lloyd's Rep 237, [1969] 2 All ER 641, [1969] 2 WLR 1073; *Lan You Timber Co v United General Insurance Co Ltd* [1968] 1 MLJ 181; *D & C Finance Bhd v Overseas Assurance Corp Ltd* [1989] 3 MLJ 240; *Hashim bin Majid v Param Cumaraswamy & Ors* [1993] 2 MLJ 20; *Ford v Clarksons Holiday Ltd* [1971] 1 WLR 1412 and *Teknik Cekap Sdn Bhd v Nirwana Indah Sdn Bhd* [1996] 4 MLJ 154). It would not be out of place, at this juncture, to refer to the judgment of Hashim Yeop A Sani CJ (Malaya) in the case of *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309 (SC). There in brilliant style his Lordship said at p 314 of the report:
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> > 'Once it is established that there has arisen a dispute or difference or question, the language of s 6 of the Act places on the plaintiff the burden to show that it ought not to be referred to arbitration. As correctly stated by the learned judge, the fact that there is apparent weakness in the respondent's case should not be taken as an excuse to brush aside an arbitration clause to which the appellant was a party and which was being insisted on by the respondent.'
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> Further down the same page, his Lordship continued:
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> > 'To summarize, once the party asking for the stay has satisfied the court that there is a dispute, difference or question between the parties within the meaning of the arbitration clause, then it is a question of exercising the discretion to grant or not to grant the stay. This discretion of the court must of course be exercised judicially and exercised according to the proper principles of law. If the appellate court is satisfied that the discretion was properly exercised, the order granted should not be disturbed'.

and so the plaintiff has the burden to show that the matter ought not to be referred to arbitration. Again at p 14 of the report of the same case, I spoke of the difficulty to reconcile the cases on arbitration. This was what I said:

> I have done some research and the research showed a trend that cannot be of any help to either party. All the authorities in regard to arbitration can never be reconciled with one another. Perhaps the best guide would be found in the passages of a book entitled *Russel on Arbitration* (20th Ed) at p 421 where under the heading 'Step in the Proceedings' the learned author said:
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>> 'The reported cases are difficult to reconcile and they give no clear guidance on the nature of a step in the proceedings. It appears, however, that two requirements must be satisfied. First, the conduct of the applicant must be such as to demonstrate an election to abandon his rights to a stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the court'.

Finally, at p 16 of the report of the same case, I summarized the position in this way:

> The expression 'steps in the proceedings' appearing in s 6 of the Arbitration Act 1952 as well as in s 4 of the English Arbitration Act 1950 has given rise to a series of claims and contentions bringing to the forefront one single thread. That thread would be this. That a stay will not be granted if the applicant has taken steps in the proceedings after entering appearance in the court proceedings.

These principles of law must surely apply to the factual matrix of the present appeal. Incidentally, *PP Persero Sdn Bhd v Bimacom Property & Development Sdn Bhd* was also reported in two other popular local law journals vide [1999] 6 CLJ 275 and [1999] 3 AMR 3479.

An argument was advanced by the defendant to the effect that the defendant was entitled to have these proceedings stayed by virtue of cl 21 of both the second and the third agreements which specifically stated that any dispute shall be referred to arbitration. It was also argued that if the defendant were to file the statement of defence it would be construed adversely against the defendant in that it would be considered to be a fresh step in the proceedings thereby depriving the defendant of its right to have these proceedings stayed pursuant to s 6 of the Arbitration Act 1952. Three conditions must be fulfilled before a stay of further proceedings can possibly be granted under s 6 of the Arbitration Act 1952 and these conditions may be stated in the following terms:

(1) There must be in existence a 'dispute' which squarely falls under and within the terms of the arbitration as set out in the second and the third agreements;

(2) The defendant must actively move the court for a stay of the proceedings before taking any other steps in the proceedings (*Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97);

(3) The defendant must prove by way of an affidavit evidence that he is ready and willing to do all things requisite to enable all the matters in dispute to be determined by arbitration in accordance with the provisions of the second and the third agreements (*Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd*).

But for the purpose of adjudicating encl 28, I am only concerned as to whether there was a 'dispute' between the parties. There was no need to consider whether there was a bona fide dispute and this was aptly explained by Gopal Sri Ram JCA while sitting in the Federal Court in the case of *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273. At p 281, his Lordship explained it in this way:

> When considering an application under s 6 of the Act, it is no part of the court's function to decide whether the defendant has raised a bona fide dispute warranting a stay. The strength or weakness of the issues raised by a defendant must await the decision of the tribunal especially chosen by the parties to decide the differences that have arisen between them. It is only in plain and obvious cases, where a reasonable tribunal, without undertaking a meticulous examination of the merits, is bound to hold that the issues raised by a defendant are frivolous or vexatious, that a court may be justified in refusing a stay.

The meaning of the word 'dispute' was considered by Hashim Yeop A Sani CJ (Malaya) in the case of *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309 and at p 313 of the report his Lordship observed:

> But as to what the meaning of the word 'dispute' is, *Gujarat State Co-operative Land Development Ltd v PR Mankad & Anor* AIR 1979 SC 1203 was followed in which the word 'dispute' was defined in the following terms:
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>> 'The term 'dispute' means a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other'.

Borrowing the words of Gopal Sri Ram JCA in *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* particularly at p 282 of the report, the question to ask would be: was there 'a dispute or difference' between the parties in the present appeal? For this exercise, I must now examine the available evidence. The plaintiff's claim against the defendant hinged entirely on the three agreements and it was neatly detailed out in paras 6 and 7 of the statement of claim for alleged works done and completed. The calculations were itemized in this fashion:

Invoice No: A9602/01	RM 23,065.88
Invoice No: A9609/02	RM892,952.50
Invoice No: A9610/02	RM233,940.00
Total	RM1,149,958.38

The defendant disputed the sum as claimed by the plaintiff and it was argued for the defendant that the plaintiff did not complete the works as alleged and was therefore not entitled to claim the total amount. Alternatively, it was argued that, if at all, the plaintiff was only entitled to claim on a quantum meruit basis or on the basis of a reasonable claim.

The phrase 'quantum meruit' means 'as much as he has earned' and it is usually awarded where one party has conferred on the other a benefit in circumstances where he or she cannot be remunerated or compensated for that benefit in any other manner. It is designed to restore the actual benefit or the value of the benefit that one party has conferred on the other. It is significantly different from an award of damages. To obtain damages, the plaintiff must prove that a loss has suffered; whereas to obtain quantum meruit, a plaintiff needs only to show that the defendant has received some kind of benefit and that benefit has a particular value that can be attached to it. That being the case, a defendant would be unjustly enriched if he or she was not required to pay a reasonable amount for the benefit which he had enjoyed.

It is now trite law that quantum meruit can be awarded in both contract and quasi-contract situations. For instance, in a contract situation quantum meruit can be awarded where the parties have agreed upon a supply of goods or the rendering of services or even upon works to be done without actually specifying a price. In such situations, if the defendant refuses to pay or if the parties cannot agree on appropriate remuneration, then the court is empowered to award a quantum meruit on the basis of what the aggrieved party deserved.

In contrast, in a quasi-contract, a quantum meruit can readily be awarded for work done or for goods supplied either under a contract which turns out to have been void or unenforceable (*Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221).

It is a correct statement of the law to say and I so say that a plaintiff who has done part of what was required by the contract but who has not completed performance because of some personal breach cannot succeed on a quantum meruit. There is yet another situation where the contract was entire and performance was not restricted or prevented by the defendant, then the plaintiff cannot recover either damages or a quantum meruit and the defendant will simply enjoy the benefit as a gain. A case in point would be *Sumpter v Hedges* [1898] 1 QB 673 and the facts may be stated as follows. There the plaintiff had contracted to build two houses on the defendant's land for £565. When the houses were half complete, the builder ran out of money and conveniently abandoned the project. The defendant then completed the work. The builder sued for payment for what he had done. The court held that the contract was entire and thus the builder could not recover under it. Furthermore, as the plaintiff's failure to complete was not attributable to anything done by the defendant, it was held that the plaintiff had no entitlement to a quantum meruit. That being the case, the court held that the defendant was not required to pay anything at all. Collins LJ at p 676 of the report observed:

> There are cases in which, though the plaintiff has abandoned the performance of a contract, it is possible for him to raise the inference of a new contract to pay for the work done on a quantum meruit from the defendant's having taken the benefit of that work, but, in order that that may be done, the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done… . Where, as in the case of work done on land, the circumstances are such as to give the defendant no option whether he will take the benefit of the work or not, then one must look to other facts than the mere taking the benefit of the work in order to ground the

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> inference of a new contract. In this case I see no other facts on which such an inference can be founded. The mere fact that a defendant is in possession of what he cannot help keeping, or even has done work upon it, affords no ground for such an inference. He is not bound to keep unfinished a building which in an incomplete state would be a nuisance on his land.

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Not all quantum meruit claims are successful. In *Chan Yuet Chan @ Chan Oi Lin b/s Wing Sun Trading Co v Martego Sdn Bhd* [1996] 2 BLJ 431, the claim for quantum meruit failed because the plaintiff was in fact over paid. In *Lion Engineering Sdn Bhd v Pauchuan Development Sdn Bhd* [1997] 4 AMR 3315, the claim for quantum meruit also failed because the contract contained a clause spelling out in express terms the consideration payable.

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So much for quantum meruit and I shall now revert to the mainstream of the appeal.

It was argued on behalf of the plaintiff that there was no dispute and that the defendant had not disputed nor objected to the plaintiff's invoices. It was also said that the defendant did not show any document to indicate that the defendant had disputed the plaintiff's services. The plaintiff heavily relied on two letters dated 20 July 1996 and 17 August 1996 (as per exhs 'HA-10' and 'HA-11' of encl 14) which showed the confirmation of the value of the works allegedly completed and done by the plaintiff. It was also submitted that the architectural drawings have been extended to the defendant by way of a letter dated 17 October 1996 without any objections whatsoever. The plaintiff too relied on the minutes of the meetings which showed that the defendant's representatives acknowledged receipt of the plaintiff's invoices. In the minutes of the meetings, it categorically stated that payment will be made and the defendant admitted facing financial difficulty and of importance it carried the tales that the defendant refused to pay the fees and merely intended to delay the plaintiff's claims. The plaintiff also relied on the minutes of the meetings to prove that the alleged works were carried out on the directions and approvals of the defendant.

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By way of a rebuttal, the defendant submitted that the failure to object to the plaintiff's invoices could not be construed as an acceptance of the invoices nor did it mean that there was no dispute in respect to it. It was emphasized that the plaintiff had by letter dated 12 July 1999 which was addressed to the defendant, admitted that the works were not completed and the services rendered too were incomplete in so far as Invoice No A 9602/01 dated 28 May 1996 was concerned. The sting of the letter dated 12 July 1999 was more pronounced considering the fact that the invoice was dated 28 May 1996 and the action was only filed on 14 June 1997. It was pointed out that the letters emanating from Perundingan ZNA dated 20 July 1996 and 17 August 1996 as seen in encl 14 of exhs 'HA-10' and 'HA-11' which verified the value of the works allegedly completed by the plaintiff did not bind both the plaintiff and the defendant for the following reasons:

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(1) It was qualified as being without prejudice and therefore it did not bind the defendant. Those letters were signed by engineer Tan Ah Chai and it was more of the qualified personal opinion of the said

engineer. Moreover, the said engineer has to be called as a witness to be meticulously examined as to why he qualified his letters in regard to the value of the works. A

(2) By qualifying the letters as being without prejudice, it was argued that the valuation cannot be relied upon to prove the level of the works allegedly completed by the plaintiff and cannot be the basis of the claim. B

Now, the 'without prejudice' tag gives rise to an understanding between the parties that all previous (*Oliver v Nautilus Steam Shipping Co Ltd* [1903] 2 KB 639) and subsequent (*Davies & Davies v Nyland & O'Neill* (1975) 10 SASR 76 at p 105) negotiations will be protected from disclosure. The sting of the 'without prejudice' tag can only be appreciated when one looks at the purpose behind incorporating those words in a correspondence. According to the case of *Walker v Wilsher* (1889) 23 QBD 335 at p 337, the words 'without prejudice' mean 'without prejudice to the position of the writer of the letter if the terms he proposes are not accepted'. The court in *Field v Commissioner for Railways* (1957) 99 CLR 285 at p 291 aptly said: C D

> As a matter of policy, the law has long excluded from evidence admissions by words or conduct made by parties in the course of negotiations to settle litigation. The purpose is to enable parties engaged in an attempt to compromise litigation to communicate with one another freely and without the embarrassment which the liability of their communications to be put in evidence subsequently might impose upon them. E

and this passage when applied to the facts of the present appeal meant that the writer of those letters dated 20 July 1996 and 17 August 1996 wanted the privilege to be attached to those letters. This was, in the circumstances, the only reasonable inference that can be drawn in the present appeal.

(3) It was argued that engineer Tan Ah Chai was engaged as a consultant by Rahika Holdings Sdn Bhd and that the alleged report was addressed to Rahika Holdings Sdn Bhd and not to the plaintiff. At any rate, it was rightly pointed out that the report was qualified. F

(4) At para 5 (e) of encl 15, it was averred that the architectural drawings allegedly forwarded to the defendant were not complete and cannot be relied upon. G

(5) The plaintiff admitted that the drawings were for checking purposes only as alluded to in para 11 of encl 18. This meant that they were not final drawings and that the plaintiff did not complete the works as alleged and it raised a serious doubt as to the valuation conducted by engineer Tan Ah Chai as seen in two letters dated 20 July 1996 and 17 August 1996. This also raised the crucial question of whether the plaintiff was entitled to a full fee or a partial fee only. Bereft of the final drawings, all these points cannot be ascertained with some measure of accuracy. H

(6) In the various affidavits, the defendant challenged the plaintiff to provide for the 'final drawings' for the respective stages allegedly completed by the plaintiff, yet the plaintiff failed to respond. Such I

failure meant that the plaintiff admitted that it did not complete the works as alleged (*Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; and *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281).

An argument was advanced to the effect that the plaintiff's conduct in claiming for works that were not completed was wholly inequitable and that the plaintiff was guilty of unconscionable conduct. It was pointed out that there were issues to be tried and those issues raised doubts as to the plaintiff's claims. It was also said that the plaintiff's claims, in its correct perspective, lacked bona fides and that there were disputes between the parties. At this stage, it would be germane to reproduce certain passages in the case of *Lim Su Sang v Teck Guan Construction & Development Co Ltd* [1966] 2 MLJ 29, where at p 32 Thomson LP (as he then was) aptly observed:

> In the present case, however, it is difficult to see how it can be said that there is no dispute in connection with the agreement between the parties and that the arbitration clause is a term of that agreement. Under and by reason of the agreement there is an obligation on the contractor to do certain work and an obligation on the employer to pay for it. On the material before us what the contractor has sued to enforce is the employer's obligation to pay which arises from that agreement. He has not mentioned the agreement in terms in his statement of claim as endorsed on the writ but the employer has said in his affidavit that if there is any obligation it is under the agreement and that has not been denied; the contractor has not said for instance that he is suing on a quantum meruit or to enforce any other sort of obligation that does not arise from the agreement or anything of the sort. The employer says he has a good defence, that is, he says he is subject to no obligation under the agreement which can be enforced against him. In the circumstances how can it be said that there is no dispute in connection with the agreement?

and as an offshoot, the interesting question to pose would be: if there were no disputes, why were the parties at loggerheads in the present appeal?

The judgment in default of defence was bad in its entirety because the sum claimed was excessive and prematurely obtained

It was argued on behalf of the defendant that the judgment in default of defence ought to be set aside as of right for the following reasons:

(1) that the plaintiff was not entitled to claim for Invoice No A 9602/01 dated 28 May 1996;

(2) that the defendant should not be defaulted for not paying the sum claimed in Invoice No A 9602/01 dated 28 May 1996 as it was not due and payable;

(3) that the judgment for the sum of RM1,149,958.38 was certainly wrong and in excess of that which may be correctly due and forthcoming to the plaintiff;

(4) that the judgment for the sum of RM1,149,958.38 was bad in its entirety because part of it was prematurely obtained; and

(5) that the plaintiff had failed to offer any explanation through affidavit evidence pertaining to the matters alluded to above.

At this juncture, my attention was drawn to the case of *C Paul D'Cruz v Chow Tai Yow & Sons Sdn Bhd* [1999] 1 MLJ 51, where at p 56 of the report, I had this to say:

> I venture to say that where the judgment is irregular or where the judgment was entered for a larger sum than was claimed, then that judgment will be deemed to be bad and as a matter of right be set aside forthwith. Ex debito justitiae, that kind of judgment would be set aside. I will even proceed to say that a judgment entered before actual default as done by the defendant would be irregular and the defendant too would as a matter of right be entitled to set it aside. In the local context, Zakaria Yatim J (now FCJ) in *Malayan United Bank Bhd v Mohamed Salleh bin Mohammed Yusoff & Ors* [1988] 3 MLJ 165 at p 169 said:
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>> 'since the respondent had entered judgment with the rate of interest after the date of judgment far in excess of the statutory rate of 8% per annum, the applicant has a right ex debito justitiae to have the judgment set aside (see *Hughes v Justin* [1894] 1 QB 667).'

Continuing at p 57 of the report, I had this to say:

> In *Muir v Jenks* [1913] 2 KB 412, the plaintiff signed judgment in default of appearance for a sum in excess of that which was due to him. On an application by the defendant to set aside the judgment, one of the points taken by counsel for the defendant in the argument was that the judgment was irregular on the ground that it was signed for the wrong amount. It was suggested to the plaintiff by the Master hearing the application that the error should be rectified but counsel for the plaintiff took the stand that as the bankruptcy notice was served for the right amount nothing could be gained by rectifying the judgment. The judgment was not set aside by the Master and his decision was affirmed by Bucknill J. On appeal, the Court of Appeal held that the judgment was wrong and set it aside. Buckley LJ had this to say in his judgment (see pp 415-416):
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>> 'The point was taken before the Master, who suggested that the judgment should be amended as being wrong through an accidental slip, but counsel for the plaintiff, so far from seeking to have the judgment put into proper form, took the view that no good was to be obtained by that course and elected to stand by his judgment as it was. From May 1912 to March 1913, no question as to the judgment was raised by the debtor. Both the Master and the judge appear to have thought that the debtor himself ought to have taken steps to get the judgment corrected and that for default in so doing he was now precluded by delay from having the judgment set aside. In my opinion, that is wrong. It is the duty of the creditor if he obtains a wrong judgment to have it set right. It is not the duty of the debtor against whom he has obtained the judgment to do so. The question therefore does not turn upon delay by the debtor. The position is this. Here is a judgment which is wrong. The person who holds it has not sought to set it right, on the contrary he has said that there was no good in doing so.'

and these passages when applied to the factual matrix of the present appeal meant that the judgment in default of defence ought to be set aside ex debito justitiae.

A *That leave be given to the defendant to file the statement of defence*

It was argued that in the event this court was of the view that the judgment in default of defence was regularly obtained and that the action ought to be referred to arbitration, the defendant should be given the chance to file the statement of defence because it had a defence on the merits as against the B plaintiff's claim. Reliance was placed on the case of *C Paul D'Cruz v Chow Tai Yow & Sons Sdn Bhd*, especially to the headnote at pp 51–52 of the report which said:

> A judgment in default is a judgment given to the plaintiff (the respondent in this case) without the court hearing the merits of the plaintiff's case. The court C has the absolute discretion to set aside such judgment on the application of the defendant (the appellant in this case) who need only disclose a defence on the merits, namely an arguable or triable issue.

Current Law Journal also carried the report of *C Paul D'Cruz*'s case and in fact it carried the report earlier in point of time: [1998] 4 CLJ Supp 389. Be that as it may, Lee Hun Hoe CJ (Borneo) in *Fira Development Sdn Bhd v* D *Goldwin Sdn Bhd* [1989] 1 MLJ 40 at p 41 had this to say:

> Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the court has an absolute discretion to set aside the judgment, if necessary, on terms and allow the case to be heard on the merits. Lord Atkin stated clearly the E principles in which the court should act in *Evans v Bartlam* [1937] AC 473 in these words:
>
>> ' … The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.'
>
> F In the instant case the learned judge did not consider the judgment to be irregular. *Mallal's Supreme Court Practice* (2nd Ed) Vol I at p 84 explains the position where the judgment is regular thus:
>
>> 'The discretion will only be exercised if the affidavit supporting the application to set aside discloses facts showing a defence on the merits; or G for some very sufficient reason: *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23; *Farden v Richter* (1889) 23 QBD 124.'
>
> A defence on the merits means merely raising only an arguable or triable issue, eg contributory negligence in a running down case in *White v Weston* [1968] 2 QB 647. A judgment in default is not a judgment on the merits: *L Oppenheim* H *& Co v Mahomed Haneef* [1922] 1 AC 482.

In *Majukayu Sdn Bhd & Anor v Wong Pek Shong & Anor* [1994] 2 CLJ 66, at p 68 of the report, I had this to say:

> It is now trite law that where applications are made to set aside default but regular judgments, the rule, which has sometimes been described as 'an I almost inflexible rule', is that there ought to be affidavits stating facts showing a defence on the merits. In *Evans v Bartlam* [1937] AC 473, Lord Atkin in his judgment at p 480 said:

> > '...that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence ... .'
>
> In *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23 FC, Raja Azlan Shah Ag CJ (Malaya) (as His Majesty then was) said:
>
> > '... It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits ... .'
>
> And to show a defence on the merits, a defendant need only disclose an arguable or triable issue (*B Dialdas & Co (Pte) Ltd v Sin Sin & Co & Ors* [1984] 2 MLJ 223).
>
> The courts are given the wide discretion to set aside default judgment. Thus, there cannot be any rigid rule governing the setting aside of default judgment. I am fortified in this proposition by a passage appearing in *Evans v Bartlam* where Lord Atkin said:
>
> > 'If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.'
>
> The question for this court to consider is whether the affidavits of the appellants as set out above disclose a defence on the merits or an arguable or triable issue.
>
> The Sessions Judge refused to set aside the default judgment as the appellants had failed to file their statement of defence. The failure to file the statement of defence should not be an obstacle to set aside the default judgment (*Ng Fook Hiong v Arunachalam Chettiar* [1967] 1 MLJ 25) and by adopting such an approach, the Sessions Judge had failed to consider the principles as set out in *Evans v Bartlam*) and in *Bank Bumiputra (M) Bhd v Majlis Amanah Ra'ayat.*

These principles of law serve as useful guidelines in adjudicating encl 28. On the facts, it was clear that the judgment in default of defence was obtained as a result of a procedural default, namely, the failure to file the statement of defence. That failure was simply meant to preserve the defendant's right to refer the dispute to arbitration and had the defendant filed the statement of defence, the defendant would be prejudiced in that the matter cannot be referred to arbitration. The plaintiff's conduct was, pure and simple, unconscionable. The plaintiff took advantage of the RHC knowing fully well that the defendant would not enter a defence as the defendant was interested in referring the matter to arbitration. The defendant, all along, were anxiously waiting for the plaintiff's solicitors to revert with the relevant instructions. But alas, it was not forthcoming. At this juncture, I recall to mind the sage words of the then Supreme Court in the case of *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312, where at p 313, the headnote reads:

> It was only proper that all the issues raised by the respondent, which were substantial and had merits, ought to be tried at a proper trial so that witnesses could be called to explain to the court what the nature of commercial banking practice in processing and approving the loans are and other relevant issues. Under the circumstances, there was no ground to justify the court in interfering with the learned judge's exercise of his discretion under O 19 r 9 of the RHC.

and in the context of the present appeal, the relevant witnesses ought to be produced so that they could testify as to the characteristics, architectural works and the development issues of the project that were governed by the three agreements alluded to somewhere in this judgment. The final drawings which the plaintiff failed to produce must also be produced in the course of the trial. For these varied reasons and in the interest of justice, the appeal in encl 28 should be allowed with costs. I vigorously applied and without hesitation would apply the maxim 'audi alteram partem' in favour of the defendant. This was my judgment and I so hold accordingly.

Appeal allowed.

Reported by Jafisah Jaafar